



# Ruminations on the Work of Frederick Schauer

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## RUMINATIONS ON THE WORK OF FREDERICK SCHAUER

*Richard H. Fallon, Jr.\**

Over many years of reading Fred Schauer's work, and learning from it, I have sometimes agreed and sometimes disagreed with his positions, but always I have felt challenged and engaged. In this essay, I want to pay tribute by ruminating on some of Schauer's themes. Among the upshots of my ruminations is a question whether several of his most important and influential ideas may not be in some tension with one another.

My ruminations mainly concern four of Schauer's texts. I begin with a brief, largely uncritical appreciation of an essay entitled *The Second-Best First Amendment*,<sup>1</sup> in which I first encountered Schauer's important, recurring theme that legal rules have a crucial role as devices for the allocation of decisionmaking power. Subsequent sections consider whether some of Schauer's well-known jurisprudential writings—notably his influential book *Playing by the Rules*<sup>2</sup> and his article *Rules and the Rule of Law*,<sup>3</sup> which advance a theory that he labels "presumptive positivism"—are consistent with the account of rules as devices for the allocation of power that is offered in *The Second-Best First Amendment*. Although any surface inconsistency could probably be repaired, I conclude that Schauer's jurisprudential theory of presumptive positivism would need to be both expanded and partly compromised for all of his central claims to be made fully consistent with one another. I then reflect critically on Schauer's recent, impor-

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\* Professor of Law, Harvard University. I am grateful to Kirsten Mayer for research and editorial assistance.

1 Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989) [hereinafter Schauer, *Second-Best First Amendment*].

2 FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) [hereinafter SCHAUER, *PLAYING BY THE RULES*].

3 Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991) [hereinafter Schauer, *Rules*].

tant article, *Amending the Presuppositions of a Constitution*.<sup>4</sup> Among other observations, this discussion yields the question whether Schauer's insights about the "presuppositions" of our constitutional order—to cite the concept that his article has helpfully introduced into debates about the theory of constitutional amendment—accord with the semantic theory that underlies some of his claims about rule-based decisionmaking in law.

Although I shall raise some other issues along the way, my principal complaint, if I have one, may be that Schauer has too many good ideas for all of them to fit together neatly.

### I. THE SECOND-BEST FIRST AMENDMENT

*The Second-Best First Amendment*<sup>5</sup> develops an important theme that resonates throughout Schauer's subsequent writing: There is a vital distinction between a substantive or regulatory rule—a prescription to act or refrain from acting in a particular way—and the background values that justify the prescription.<sup>6</sup> For example, it might be the purpose of the First Amendment to respect individual autonomy, to promote the discovery of truth, or to support a well-functioning political democracy.<sup>7</sup> But the rules implementing the First Amendment seldom direct that cases should be resolved on the basis of an all-things-considered assessment of what would be best in light of underlying values. We have, instead, rules established by such well-known cases as *New York Times Co. v. Sullivan*<sup>8</sup> and *Brandenburg v. Ohio*<sup>9</sup> that rather rigidly constrain decisionmakers. Sometimes the constraint is painful. Once laid down, a First Amendment rule may occasionally require decisionmakers to reach less than optimal results in particular cases, as measured by the values underlying the rule.<sup>10</sup>

The insight can be generalized. Legal rules, Schauer suggests, are inherently second-best. An ideal decisionmaker, permitted to make all-things-considered judgments, would be able to reach the best possible result in every case. Rules, by contrast, bind a decisionmaker to prescriptions laid down in advance by rule-making authorities act-

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4 Frederick Schauer, *Amending the Presuppositions of a Constitution*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 145 (Sanford Levinson ed., 1995) [hereinafter Schauer, *Amending the Presuppositions*].

5 Schauer, *Second-Best First Amendment*, *supra* note 1.

6 *See id.* at 11–12.

7 *See id.* at 4.

8 376 U.S. 254 (1964).

9 395 U.S. 444 (1969) (per curiam).

10 *See* Schauer, *Second-Best First Amendment*, *supra* note 1, at 7, 13.

ing with less than perfect knowledge and foresight.<sup>11</sup> It is therefore an endemic feature of rules that they yield less than optimal results. Nonetheless, there are good reasons why we sometimes want rules, despite their inherent deficiencies as measured against the ideal.<sup>12</sup> Among these reasons is that all human decisionmaking, including that by judges, is prone to error. And sometimes it is relatively predictable that judges, or other decisionmakers, will be likely to make particular kinds of errors—overestimating certain kinds of harm or risk, for example—if authorized to make all-things-considered decisions<sup>13</sup>

Schauer's point is a deep one. Having rules confers benefits, but the benefits always come at a price. One of the questions that Schauer presses is when this price is worth paying, in light of the alternative price that we would pay for not having rules.<sup>14</sup> As he takes pains to point out, it would be impossible to provide a general answer to this overbroad and imprecise question. But a crucial consideration is that legal rules are devices for the allocation of power.<sup>15</sup> Although an ideal decisionmaker would be able to make better all-things-considered decisions than rule-based decisionmaking permits, we know that actual decisionmakers frequently are far less than ideal. Partly as a result, modern constitutional doctrine does not, for example, generally trust police officers to make all-things-considered judgments about whether it would be desirable to conduct warrantless searches of houses.<sup>16</sup> We do not trust legislatures to make all-things-considered judgments about whether to restrict the expression of obnoxious or even dangerous ideas in a public forum. And we do not trust judges, or even Justices of the Supreme Court, to make all-things-considered judgments about whether anyone should be punishable for treason in the absence of "the Testimony of two Witnesses to the same overt Act, or . . . Confession in open Court."<sup>17</sup>

A common form of legal analysis condemns "formalist" adherence to rules in cases in which an all-things-considered assessment of relevant values would dictate a different result.<sup>18</sup> But Schauer reminds us that it is impossible to have the benefits of all-things-considered decisionmaking without the costs. To authorize an official—

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11 *See id.* at 16–17.

12 *See id.* at 14–17.

13 *See id.*

14 *See id.* at 9, 14.

15 *See id.* at 14 n.46, 20 n.53.

16 *See id.* at 15.

17 U.S. CONST. art. III, § 3, cl. 1.

18 *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

whether a police officer or a judge—to disregard a rule is to shift power enormously from the rule-maker or system designer to the official with front-line decisionmaking responsibility.<sup>19</sup>

In my view, *The Second Best First Amendment* is a small gem of an article. It provides, first, a plausible account, elaborated in Schauer's later work, of the nature of rule-based decisionmaking. Within this account, rules are "entrenched generalizations"<sup>20</sup> with some capacity to preclude those to whom they are addressed from making decisions on an all-things-considered basis or even on the basis of the rule's background justifications.<sup>21</sup> If rules were not "opaque" to their background justifications to at least some extent—if they could be disregarded whenever a decisionmaking official thought that applying the rule would yield a sub-optimal result—they would not be "rules" in any meaningful sense. Second, *The Second-Best First Amendment* situates rule-based decisionmaking in a legal system, which is itself located in a broader culture, and thus invites attention to questions of where decisionmaking authority of different kinds ought to be located.<sup>22</sup> Among other things, Schauer's perspective provides an important counterbalance to prominent theories, such as that of Ronald Dworkin,<sup>23</sup> that are idealized and judge-centered. It is small exaggeration to say that Dworkin develops his theory by assuming the vantage point of a morally and intellectually ideal judge, Hercules, who displays an incessant, personal preoccupation with achieving a body of law that is consistent in principle. In considering issues of institutional design, Schauer is right to remind us that not every judge possesses herculean capacities and, what is more, that judges are only one among many classes of decisionmakers to whom legal rules are addressed. Dworkin's "interpretive protestantism"<sup>24</sup> may at least look more problematic once the lens is widened and the full set of legal decisionmakers is seen in life-like detail.

I could, of course, raise some quibbles and deprecations concerning *The Second-Best First Amendment*. In its emphasis on the function of

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19 See Schauer, *Second-Best First Amendment*, *supra* note 1, at 20 n.53.

20 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 191.

21 See Schauer, *Second-Best First Amendment*, *supra* note 1, at 10–12.

22 See *id.* at 14–23.

23 See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

24 See DWORKIN, *LAW'S EMPIRE*, *supra* note 23, at 413 (characterizing his theory as embracing "a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances").

rules in allocating power and determining action by law-applying officials, the article may pay insufficient heed to other functions of rules, such as facilitating coordinated activity and providing clear notice of rights and obligations.<sup>25</sup> When these functions are taken into account, the notions of the "ideal" and the "second-best" become more complex than Schauer expressly acknowledges. In addition, many of the article's best insights, though presented in a fresh and arresting way, have close analogues in previous work contrasting "rules" with "standards."<sup>26</sup> Finally, as I shall discuss further below,<sup>27</sup> I think that there may be somewhat broader scope for the "interpretation" of legal rules than some of Schauer's formulations (even if not his formal position) may suggest.

But the quibbles are little more than that. *The Second-Best First Amendment* provides a valuable template for thinking about how first amendment doctrine ought to be structured and, more generally, for thinking about the role of rules in law.

## II. PRESUMPTIVE POSITIVISM

Since *The Second-Best First Amendment*, Schauer has continued his exploration of the nature and functions of rules. His most extensive discussion comes in an important and broad-ranging book, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*.<sup>28</sup> The book is richly illuminating along many dimensions. In particular, Schauer expands his account of what rules are and how they work, and he has much to say about how different kinds of rules can and must function in law. In both *Playing by the Rules* and a roughly contemporaneous article, *Rules and the Rule of Law*,<sup>29</sup> Schauer presents his most important claims about legal rules as aspects of a theory that he calls "presumptive positivism."<sup>30</sup> In an earlier writing, I spoke enthusiastically of presumptive positivism.<sup>31</sup> More recently, I have had second thoughts. Although I continue to think that Schauer provides a valuable perspective on the nature and functions of legal rules, I have grown doubtful that presumptive positivism suc-

25 Schauer refers to such functions, but only fleetingly. See Schauer, *Second-Best First Amendment*, *supra* note 1, at 14.

26 See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

27 See *infra* Part V.

28 SCHAUER, *PLAYING BY THE RULES*, *supra* note 2.

29 Schauer, *Rules*, *supra* note 3.

30 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 196-206.

31 See Richard H. Fallon, Jr., *Common Law Court or Council of Revision?*, 101 YALE L.J. 949 (1992) (book review).

ceeds as a general jurisprudential theory.<sup>32</sup> To express my reservation only slightly more concretely, I question whether presumptive positivism offers sufficiently clear and useful answers to the particular questions about the nature of law that it sets out to answer.

### A. *Rules in Law*

Schauer argues persuasively that it is impossible to imagine a legal system that is not largely an "affair of rules"<sup>33</sup>—rules that have the allocation of power as a central function. In elaborating this claim, Schauer distinguishes two types of rules. "Jurisdictional rules" assign power to render particular kinds of decisions.<sup>34</sup> For example, legislatures are empowered by rule to enact statutes regulating private conduct, and courts are given responsibility for adjudicating disputes. In contrast with jurisdictional rules establishing decisionmaking institutions, substantively constraining or "regulative" rules determine the particular decisions that duly constituted decisionmaking institutions must make.<sup>35</sup> The concept of law or of a legal system, Schauer interestingly argues, does not require "a substantial array of outcome-determining rules sharply limiting the decisionmakers' judgment or discretion."<sup>36</sup> But while law does not require regulatory rules, neither, Schauer argues, does it forbid them. Substantive or regulatory rules are common in our legal system and, as suggested in *The Second-Best First Amendment*, frequently bind judges and other decisionmakers. Or do they?

Building on ideas that he attributes to Ronald Dworkin and Duncan Kennedy,<sup>37</sup> Schauer sketches (for the purpose of addressing) a forceful challenge to the notion that rules actually bind judges as a

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32 Cf. Ruth Gavison, *Comment: Legal Theory and the Role of Rules*, 14 HARV. J.L. & PUB. POL'Y 727, 730–31 (1991) (distinguishing a theory of rules and their role from a theory of law).

33 Schauer, *Rules*, *supra* note 3, at 651; see SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 168.

34 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 169–74; see also Schauer, *Rules*, *supra* note 3, at 651–54 (discussing empowering rules that create decisionmaking environments).

35 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 171–74; see also Schauer, *Rules*, *supra* note 3, at 651 (discussing "regulatory" rules).

36 Schauer, *Rules*, *supra* note 3, at 654; see also *id.* at 657 ("[A] system employing empowering rules but leaving substantive decisionmaking authority largely unconstrained by external legal rules seems both pragmatically plausible and accepted as 'law' within the world in which we now exist."); SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 172.

37 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 200–02; Schauer, *Rules*, *supra* note 3, at 667–77.



matter of law. The challenge begins with an empirical observation: there are cases, including well-known cases,<sup>38</sup> in which judges have rejected or modified an applicable legal rule based on the perception that applying the rule would be unacceptable in light of other norms that are generally recognized within the society.<sup>39</sup> Nor, Schauer suggests, can such cases be dismissed as aberrant instances of judicial default of legal duty. Cases in which judges have held "local,"<sup>40</sup> applicable rules not binding are too numerous, and many of them are too much respected as paradigms of good judging, for this explanation to work.<sup>41</sup> Looking at cases such as these, others have suggested that what are commonly taken to be legal "rules" are really no more than "rules of thumb."<sup>42</sup> Unlike "rules" as Schauer uses the term, "rules of thumb" do not purport to block all-things-considered decisionmaking on the facts of any particular case.<sup>43</sup>

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38 Schauer structures much of his discussion around *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889), which held that a killer could not inherit under the will of his victim, and *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960), which held that a consumer's waiver of a warranty on an automobile was invalid, even though not fraudulently obtained, because enforcement would be contrary to public policy.

39 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 200–02.

40 Schauer introduces the concept of "locality" to resolve some otherwise apparent conflicts occurring within complex rule systems. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 188–91. He relies heavily on an example to elucidate what he means:

Consider the difference between two rules, one requiring all drivers to drive safely at all times and another setting a *minimum* speed of 40 miles per hour on a certain stretch of limited-access highway. . . . [A]lthough many cases can be imagined in which two (or more) potentially conflicting rules are applicable, one of the rules may seem *more* applicable, or, to put it better, more *directly* applicable. The rule that is less general, and applicable to a smaller number of events, seems to be more applicable to the events to which it does apply.

*Id.* at 189 (emphasis in original). According to Schauer, "for rules to operate *as rules* within a system of rules, . . . they must be treated as entrenched generalizations with respect to other [less directly applicable] rules as well, and it is that relationship that the idea of local priority seeks to capture." *Id.* at 190–91 (emphasis in original).

Although I cannot develop the point here, I find the metaphor of local priority—for I take it to be no more than a metaphor—somewhat more mysterious and less analytically helpful than Schauer supposes it to be.

41 See *id.* at 200.

42 According to Schauer, "rules of thumb" are prescriptive generalizations that offer "no independent reasons for decision when they indicate results other than those indicated by the direct application of [their underlying justifications]." Schauer, *Rules*, *supra* note 3, at 648.

43 See *id.* at 648–49.

Against this challenge to the claim that our legal system (among others) makes important use of regulatory rules that forbid or at least restrict all-things-considered decisionmaking, Schauer offers his theory of presumptive positivism:<sup>44</sup> Rules bind, but only up to a point. Or, in Schauer's vocabulary, the force of those legal rules that are distinctively recognized as such under accepted rules of recognition<sup>45</sup> or similar "pedigree" tests is "presumptive" only.<sup>46</sup> Somewhat more specifically, the prescriptive force of legal rules is capable of being overcome in cases in which the moral, political, or practical costs of applying a rule would be too large and unacceptable.<sup>47</sup> In such cases, Schauer argues, the legal rule ceases to bind, and a judge or other decisionmaker is authorized to do whatever seems best to him or her, in light of the full range of moral and other norms recognized within the society.

Among its virtues, Schauer's theory of presumptive positivism draws attention to, and begins the process of providing a plausible reconciliation of, what I take to be two widely shared understandings of competent lawyers. On the one hand, rules—largely as a result of their literal or semantic applicability—frequently determine outcomes. On the other hand, literalism has its limits; good judges will often, if not usually, find a way to avoid outcomes that would involve serious injustices or frustrate important public policies.

Nevertheless, Schauer's account leaves open a number of questions, one of which seems to me to be of foremost importance: are the weight and nature of the considerations adequate to justify a rejection or modification of a legal rule, or the recognition of an exception,

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44 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 203–06; Schauer, *Rules*, *supra* note 3, at 674–79.

45 The term "rule of recognition," which can be traced to H.L.A. HART, *THE CONCEPT OF LAW* 94–95 (2d ed. 1994), refers to "common public standards" accepted by a legal system's relevant officials for determining what the law is. *Id.*

46 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 204 ("Presumptive positivism is a way of describing the interplay between a pedigreed subset of rules and the full (and non-pedigreeable) normative universe, such that the former is . . . presumptively controlling in [a] not-necessarily-epistemic sense of presumptive."); Schauer, *Rules*, *supra* note 3, at 674–77.

47 Schauer has offered slightly varying specifications of the conditions under which the presumption for applying an applicable legal rule might be overcome. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 196 (referring to considerations of "exceptional strength"); *id.* (calling for displacement in light of "particularly exigent reasons"); *id.* at 205 ("[T]he rule will be set aside when the result it indicates is egregiously at odds with the result that is indicated by [a] larger and more morally acceptable set of values."); Schauer, *Rules*, *supra* note 3, at 676 (stating that a result indicated by a rule should be reached in the absence of "a reason of great strength for not reaching [the] result").

themselves specified by law?<sup>48</sup> If so, Schauer's position could be expressed by saying that the applicability of a particular rule can be determined only in light of the whole body of law—a position not far from Ronald Dworkin's. But this account would substantially diminish the discontinuity between rule-bound and non-rule-bound decisionmaking that the theory of presumptive positivism seems intended to portray. Schauer appears to reject it.<sup>49</sup>

Another possibility is that the considerations adequate to override an otherwise applicable rule are not in fact specified by law: the judge or other decisionmaker is empowered to make an all-things-considered judgment of when, in his or her view, the costs of obedience would be too great.<sup>50</sup> This position, however, would bring difficulties of its own. Among other things, it would generate an obvious tension between presumptive positivism, which holds that judges are excused from their legal obligations to follow the rules in cases in which the costs of rule-following would appear (to them) to be too high, and another of Schauer's recurring themes, much emphasized in *The Second-Best First Amendment*, that perhaps the central function of legal rules is to allocate power. If a principal purpose of legal rules is to allocate power, and in particular to bind judges based on a distrust of their capacity to make sound, all-things-considered decisions, it would be somewhat odd to authorize judges to reject substantive rules as unacceptable in cases that the judges believe to be of high consequence, but not in more trivial cases.<sup>51</sup>

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48 See Gerald J. Postema, *Positivism, I Presume? . . . Comments on Schauer's "Rules and the Rule of Law"*, 14 HARV. J.L. & PUB. POL'Y 797, 813 n.23 (1991) (raising a similar question). Schauer appears not to regard the question as particularly important. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 205–06:

Whether we call [the] array of overriding factors 'law' or not is a dispute that is to some extent terminological. It is also a dispute, however, that goes to the rhetoric of legality, to the extent to which legal decision-makers relying on a non-pedigreeable universe of social norms shall when doing so be buttressed by the connotations of deduction, constraint, and limited domain suggested by the word 'law.' I will explore this question no further here . . .

In Schauer, *Rules*, *supra* note 3, at 677 n.70, Schauer responds directly to Professor Postema's question. Schauer frames the issue as one contested by Ronald Dworkin and Melvin Eisenberg and observes that Eisenberg "seems to be correct" that judges may displace pedigreed legal rules in service of any of "the full set of normative propositions or sources accepted by the society at large." *Id.*

49 See Schauer, *Rules*, *supra* note 3, at 677 n.70.

50 This seems to be Schauer's view. See *id.*

51 See Margaret Jane Radin, *Presumptive Positivism and Trivial Cases*, 14 HARV. J.L. & PUB. POL'Y 823, 832 (1991). Curiously, Schauer himself has made a similar criticism of the theory that he calls "rule-sensitive particularism," under which

There might of course be other reasons, not fundamentally based in concerns about likely judicial error and a desire to allocate power in such a way as to achieve "second-best" results, for giving judges more authority in relatively important cases than in relatively unimportant cases. These might include interests in predictability and ease of decisionmaking, which might be thought to be outweighed in momentous but not trivial disputes,<sup>52</sup> as well as a desire to preserve public confidence that judges as much as citizens are subject to the rule of law. Nonetheless, if rules bind only in trivial cases, the force of one of Schauer's central claims would be significantly undermined. Or would it?

If rules allocate power by limiting the authority of decisionmakers to make all-things-considered judgments, there is clearly no reason to think that all legal decisionmakers should be afforded equal authority to reject, or create an exception to, an otherwise applicable rule.<sup>53</sup> Most of us want cops on the beat simply to obey duly propounded constitutional rules.<sup>54</sup> We might be willing to trust judges with a somewhat greater authority to make all-things-considered judgments

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rules are rules of thumb in the sense of being transparent to their substantive justifications, but in which their very existence and effect as rules of thumb become a factor to be considered in determining whether the rules should be set aside when the results they indicated diverged from the results indicated by direct application of their substantive justifications.

Schauer, *Second-Best First Amendment*, *supra* note 1, at 20 n.53. According to Schauer:

If the virtues of "ruleness" are seen to reside primarily in [distrust of particular decisionmakers], then the difference between rule-sensitive particularism and the stronger form of rule-based decisionmaking I have been using . . . becomes enormously important. If we are guided by a concern that certain decisionmakers should not be making certain kinds of decisions, such as the decision that this instance of speech is not one that serves the purpose of having freedom of speech, then authorizing a decisionmaker to determine whether this is the kind of decision with respect to which she should not be trusted appears, although not logically inconceivable, nevertheless psychologically bizarre. . . . If we do not trust a decisionmaker to determine  $x$ , then we can hardly trust that decisionmaker to determine that this is a case in which the reasons for disabling that decisionmaker from determining  $x$  either do not apply or are outweighed.

*Id.*; see also SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 98.

52 The characterization comes from Radin, *supra* note 51.

53 See Schauer, *Rules*, *supra* note 3, at 679-91; Schauer, *Second-Best First Amendment*, *supra* note 1, at 14-22.

54 See Schauer, *Rules*, *supra* note 3, at 684; cf. Schauer, *Second-Best First Amendment*, *supra* note 1, at 15 (noting widespread reluctance to entrust "members of the Chicago Police Department" with the authority to decide on an all-things-considered basis "whether to remove an offensive painting of a popular former mayor from the walls of the School of the Art Institute").

about what would be best.<sup>55</sup> And we might, I suppose, think that judges of the highest court within a jurisdiction, such as the Supreme Court, should have even greater lawful authority to reject a rule or craft a new one in order to achieve an important good or avoid a serious harm.<sup>56</sup>

Resisting Dworkin's sometimes titanic influence,<sup>57</sup> Schauer presses the idea—which has seemed obvious to such positivists as H.L.A. Hart,<sup>58</sup> but seems implicitly to be rejected out of hand in much constitutional theorizing—that courts might best be understood as sometimes exercising lawmaking power within our legal system.<sup>59</sup> But what kind of lawmakers might courts, and especially the Supreme Court, be?

Consider two possibilities, each based on an analogy. Article V of the Constitution authorizes "We the People," acting pursuant to specified forms, to make new constitutional rules in a way that is at least broadly unbounded by substantive law.<sup>60</sup> So let us assume, for sake of argument, that "We the People," when engaged in constitutional lawmaking through the prescribed forms, can make law of any substan-

55 See Schauer, *Second-Best First Amendment*, *supra* note 1, at 17–21.

56 See Schauer, *Rules*, *supra* note 3, at 687; Schauer, *Second-Best First Amendment*, *supra* note 1, at 18–21. Schauer is emphatic, however, that such a judgment, if it could reasonably be reached at all, could not be reached "acontextually"; it would need to reflect a judgment, among other matters, that the people likely to be judges of the highest court would be likely to exercise their revisionary power in laudable ways. See Schauer, *Rules*, *supra* note 3, at 689.

57 Schauer frames his theory of presumptive positivism at least partly in response to what he characterizes as Dworkin's "powerful attack on [other forms of] positivism." SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 200.

58 See HART, *supra* note 45.

59 See Schauer, *Rules*, *supra* note 3, at 682–91.

60 The Constitution purports to preclude possible amendments aimed at altering the states' equal representation in the Senate, *see* U.S. CONST. art. V, and the Constitution as originally enacted barred the adoption of certain amendments affecting slavery and the slave trade before 1808, *id.*

A lively debate exists as to whether there are other substantive limits on the amendment authority. For the view that amendments inconsistent with the basic, underlying values of the existing Constitution would be invalid, *see*, for example, JOHN RAWLS, *POLITICAL LIBERALISM* 239 (1993); Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 4, at 163; Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386 (1983). For the opposing view, *see* John R. Vile, *The Case Against Implicit Limits on the Constitutional Amending Process*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 4, at 191; Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983).

tive content that the super-majorities required by Article V happen to prefer<sup>61</sup>—in other words, that “We the People” possess a substantively unlimited lawmaking power.<sup>62</sup> Is it plausible to imagine that the Supreme Court, when the presumption for applying established rules is overcome, possesses a comparably unbounded lawmaking authority? I think not. It seems most unlikely that Supreme Court Justices experience themselves as possessing this kind of legally conferred authority.<sup>63</sup> Vesting such power in the Supreme Court would seem equally implausible as a matter of institutional design.

A second analogy would be to a legislature. Legislatures of course possess lawmaking powers, but those lawmaking powers are themselves bounded by law (the Constitution). So it might be with the Supreme Court. When the presumption for applying established rules is overcome, the Supreme Court might be empowered to craft a new rule, but might continue to be subject to legal constraints.<sup>64</sup> The Court might be required, for example, to provide a reasoned justification of how its result comported with deep constitutional values taken to be controlling. Or it might be subject to felt requirements not to craft a rule that intruded excessively on the traditional prerogatives of another branch of government. Or, to take a different kind of example, it might regard itself as constrained not to rely on contested religious premises as grounds for decision.

On this view of the Supreme Court’s authority, the Court, like other lawmakers, would be bound, but not necessarily determined, by law; and it might proceed frankly on the hypothesis that its authority has an explicitly lawmaking aspect. Moreover, on this view, it would

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61 See U.S. CONST. art. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to the Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress.

*Id.*

62 This assumption, which I make for purposes of simplification, is in fact contested, see *supra* note 60, and I mean to take no stand on its ultimate validity.

63 Within the Hartian framework that Schauer generally accepts, rules or practices of recognition are identified by reference to the behaviors and attitudes of relevant officials. See HART, *supra* note 45, at 144–50.

64 This was certainly the view of the most celebrated modern positivist, H.L.A. Hart, as he made clear in a postscript to the second edition of *THE CONCEPT OF LAW*, *supra* note 45, at 272–74.

perhaps not be as odd as I suggested earlier for a legal system to authorize its highest court, as a matter of law, to reject otherwise applicable legal rules on occasions of high consequence. Upon the bursting of the positivist presumption, it would not be the case that the judges could simply do as they thought best, whatever that might happen to be. The resulting authority or discretion would still be circumscribed in ways that might seem acceptable to a rule-making authority concerned about allocating too much all-things-considered decisionmaking power to judges, including Justices of the Supreme Court.

As I have suggested, I think an account such as this might be generally consistent with the theory of presumptive positivism, as well as with Schauer's repeated claim that a central function of legal rules is to allocate power based on a distrust of those who, in the absence of substantive regulatory rules, would be required to render all-things-considered decisions.<sup>65</sup> On the other hand, I do not think that presumptive positivism has been developed sufficiently for it to be entirely clear how the melding of my suggested account with Schauer's theory might be effected. Somewhat more specifically, I think presumptive positivism needs a richer account of the nature of and the relationships among (i) the substantive legal rules that are presumptively binding; (ii) the second-order rules or norms specifying the kinds of considerations to which those substantive rules may yield; and (iii) the rules, norms, or practices that structure judicial decisionmaking, especially by highest courts, in cases in which the presumption calling for adherence to first-order substantive rules is overcome. Were Schauer to develop presumptive positivism in this way, my strong suspicion is that the line between rule application and judicial lawmaking would be blurred considerably in many of the cases with which he is most concerned, as would the distinction between "pedigreed" legal norms and other social norms to which a judge can appeal.<sup>66</sup> Without pretending to develop a fully adequate account of my own, I shall say a few more words about these matters below.

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65 One sentence in Schauer's book, *Playing by the Rules*, is especially suggestive in this respect: "When a decision-maker makes a decision based on only a limited number of factors, that decision-maker is operating in a world in which rules have allocated the determination of other factors to someone else or to some other person or institution." SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 231.

66 Cf. HART, *supra* note 45, at 247 (recognizing that, under a positivist theory, "the ultimate criteria of legal validity might explicitly incorporate besides pedigree, principles of justice or substantive moral values"). Schauer hints at the possibility that the bursting of the presumption for rule-following does not mark a stark divide between, on the one hand, cases in which judges are bound to follow the law and, on the other hand, cases in which their authority to make all-things-considered judgments overruns the restraints and collapses the distinctions that the word "law" characteristically

B. *Presumptive Positivism and the "Limited Domain" Thesis*

Although less than wholly satisfied with the account of the role of rules in American law that is offered in *Playing by the Rules*, I am sincere in professing admiration. The general subject area is one in which alternative perspectives and conceptualizations seem to me to have illuminating capacity. As I have suggested already, the towering influence is Dworkin, whose highly idealized account suggests that every act of law application depends at least implicitly on a legal theory that takes account of all the principles reflected in a legal system's entire body of law.<sup>67</sup> If not "argumentatively impeccable,"<sup>68</sup> Dworkin's theory is at least plausible in its main outlines and elegantly majestic in scope. But it also operates, by design and without apology, at some distance from psychological and sociological reality.<sup>69</sup> For Hercules, Schauer substitutes more fallible decisionmakers with more recognizably human psychologies; in rules, Schauer's decisionmakers find aid in doing their jobs efficiently, as well as some comfort in escaping a sense of personal responsibility to perform refined, morally freighted calculations in every case. Focused on the experience of rules "in law and in life," Schauer at least illustrates that legal decision-making can profitably be seen from angles other than Dworkin's—and maybe that, in describing what goes on, there could be no fully successful separation of theory and data.

It is less clear to me, however, that Schauer's account of the nature of rules and their characteristic functions in American law contributes usefully to the particular jurisprudential debate that he seems most concerned to join. This is the debate between proponents of a

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marks. See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 205–06. But, having raised the question, he declines to pursue it:

Whether we call [the] array of overriding factors [that sometimes allow the displacement of otherwise applicable legal rules] "law" or not is a dispute that is to some extent terminological. It is also a dispute, however, that goes to the rhetoric of legality, to the extent to which legal decision-makers relying on a non-pedigreeable universe of social norms shall when doing so be buttressed by the connotations of deduction, constraint, and limited domain suggested by the word "law." I will explore this question no further here, and conclude this chapter only with the descriptive assertion that presumptive positivism may be the most accurate picture of the place of rules within many modern legal systems.

*Id.*

67 See DWORKIN, *LAW'S EMPIRE*, *supra* note 23, at 225–58.

68 Schauer, *Rules*, *supra* note 3, at 671.

69 See DWORKIN, *LAW'S EMPIRE*, *supra* note 23, at 265 ("No doubt real judges decide most cases in a much less methodical way. But [the theoretical construct of an ideal judge] shows us the hidden structure of their judgments.").



species of "positive positivism"<sup>70</sup> and their opponents about whether, as a descriptive matter, law consists entirely of a set of distinctively "legal" rules and other norms that are sharply differentiated, at least in principle, from the broader set of "social norms" extant within a community.<sup>71</sup> According to the kind of positive positivism that Schauer seems concerned to explicate, if not partly defend, "law" is a "limited domain"<sup>72</sup> of norms recognized as such by the "the rule of recognition"<sup>73</sup> or some similar "pedigree" test that definitively separates law from nonlaw.<sup>74</sup> More pointedly, the positivism with which Schauer is concerned holds that many of the norms that are commonly used in moral, political, and prudential arguments are not part of the law, and can have no role in proper "legal" reasoning.

If I understand his point correctly, Schauer believes that presumptive positivism illustrates the partial truth of "positive positivism" and the limited domain thesis in the following way:<sup>75</sup> Insofar as rules are not outweighed by supervening considerations, the central claim underlying the limited domain thesis holds; the applicable law consists solely of pedigreed rules, and a decisionmaker is required to respect the authority of those rules. Insofar, however, as determining whether the presumptive authority of rules is overcome requires resort to all-things-considered decisionmaking, and insofar as decisionmaking after the presumption is defeated is similarly open-ended, the limited domain thesis is false.

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70 See Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982); Jules Coleman, *Rules and Social Facts*, 14 HARV. J.L. & PUB. POL'Y 703, 715 (1991). According to Coleman, "negative positivism" denies that there is any necessary connection between law and morals, whereas "positive positivism" asserts some affirmative claim about the actual or necessary nature of law.

71 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 199.

72 See Schauer, *Rules*, *supra* note 3, at 666-67, 670 n.49, 676.

73 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 198.

74 As Schauer explains:

[T]he heart of positivism lies . . . in the concept of systemic isolation. To the positivist, there can be systems whose norms are identified by reference to some identifier that can distinguish *legal* norms from other norms, such as those of politics, morality, economics, or etiquette. This identifier, which Hart refers to as the "rule of recognition" and Dworkin labels a "pedigree," picks out legal norms from the universe of other norms, and thus provides a test for legal validity. If a norm is so selected, it is a valid legal norm, notwithstanding its moral repugnance, economic inconsistency, or political folly.

*Id.* at 199; see also Schauer, *Rules*, *supra* note 3, at 666.

75 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 204-06; Schauer, *Rules*, *supra* note 3, at 678-79.

This account seems to me less helpful, and possibly less accurate, than Schauer appears to think. To begin with what may be a semantic quibble (and possibly one invited by my own attempt to reconstruct Schauer's argument, rather than the argument itself), I do not think that Schauer has done anything to save or defend the limited domain thesis. On the contrary, if his account is accepted, the limited domain thesis is false. The limited domain thesis, in the terms in which Schauer initially presents it, holds that "there is a limited domain of pedigreeable legal norms that is not extensionally equivalent to the totality of then-available social norms"<sup>76</sup> and that "if there is a legally pedigreed rule that applies to the case at hand, then it should be employed to produce the result."<sup>77</sup> By explicitly recognizing that nonpedigreed norms can sometimes override otherwise applicable pedigreed norms, and by further acknowledging that it takes at least "a peek"<sup>78</sup> at the full set of nonpedigreed norms to determine whether they are in fact overriding in any particular case, presumptive positivism would most naturally be taken as rejecting a central claim of the limited domain thesis.

Schauer attempts to rescue part of the limited domain thesis by recasting it in psychological terms: judges frequently experience a rule as binding, without conducting the all-things-considered calculation necessary to determine whether it really is binding.<sup>79</sup> He suggests that it is this phenomenology, rather than the legal ontology, that matters.<sup>80</sup> I am doubtful, however, whether Schauer's phenomenological claim, even if true, meets either the proponents or the opponents of the limited domain thesis on their own ground. On the contrary, the psychological experience described by Schauer could easily be cited as part of an explanation of how judges sometimes err in their decisions: they may fail to see that a "pedigreed" rule is outweighed by a nonpedigreed consideration, when in fact, as a matter of law, it is outweighed (under a theory, such as Dworkin's, which holds that what the law is or requires cannot be determined by exclusive reference to "pedigrees").<sup>81</sup>

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76 Schauer, *Rules*, *supra* note 3, at 666 n.41.

77 SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 200.

78 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 204-05; Schauer, *Rules*, *supra* note 3, at 677.

79 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 204-05.

80 Schauer, *Rules*, *supra* note 3, at 671-77.

81 Cf. Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 544-45 (1986) (explaining how efforts to imagine and develop legal arguments can change a judge's preliminary view about how a case must be decided as a matter of law).

In short, if Schauer's general account of the nature and functions of regulatory rules is true, then the "limited domain" thesis is not partly true as a descriptive matter, but simply false.

### III. AMENDING THE PRESUPPOSITIONS OF A CONSTITUTION

Among the central questions addressed by contributors to a recent book, *Responding to Imperfection*,<sup>82</sup> is whether it is possible for the Constitution of the United States to be amended other than through the devices provided by Article V. In influential writings over more than a decade, Professors Bruce Ackerman<sup>83</sup> and Akhil Amar<sup>84</sup> have advanced ingenious arguments that the specific mechanisms of amendment referred to in Article V should not be viewed as constitutionally exclusive. In support of his interpretation, Ackerman, in particular, has argued that a theory treating the Article V amendment mechanisms as nonexclusive is necessary to explain how profound changes in constitutional understanding—such as those associated with the Supreme Court's acceptance of New Deal constitutionalism in 1937 and thereafter—could be constitutionally legitimate.<sup>85</sup> On the other side, a number of Article V "exclusivists" maintain that the amendment mechanisms specifically authorized by the Constitution provide the only constitutionally legitimate means of effecting constitutional change.<sup>86</sup>

In his article, *Amending the Presuppositions of a Constitution*,<sup>87</sup> Schauer notes a crucial assumption that is seemingly shared by all participants in the ongoing debate. Both "exclusivists" and "nonexclusivists" assume that the question how the Constitution may legitimately be amended must be decided by interpretation of the Constitution itself; properly interpreted, it either does or does not permit amendment by means other than those specified in Article V.<sup>88</sup> Having identified this shared assumption, Schauer very insightfully challenges it. Building on Hans Kelsen's notion of a

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82 See *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 4.

83 See, e.g., BRUCE ACKERMAN, *I WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *WE THE PEOPLE*]; Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) [hereinafter Ackerman, *Storrs Lectures*].

84 See, e.g., Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

85 See ACKERMAN, *WE THE PEOPLE*, *supra* note 83; Ackerman, *Storrs Lectures*, *supra* note 83.

86 See, e.g., Dellinger, *supra* note 60; Tribe, *supra* note 60.

87 Schauer, *Amending the Presuppositions*, *supra* note 4.

88 See *id.* at 146–47.

"Grundnorm" and H.L.A. Hart's concept of a "rule of recognition,"<sup>89</sup> Schauer argues that the chain of legal justifications for our constitutional practices must at some point run out. The Constitution is law, not because it says it is, but because relevant members of the society, as a matter of social fact, accept it as such.<sup>90</sup> The social fact of acceptance is, in Schauer's term, a "presupposition" of constitutionalism and of debates about what is legitimate "under" the Constitution. But if the social fact of acceptance ultimately makes the Constitution law, acceptance also ultimately determines what the Constitution is.<sup>91</sup> Once this is recognized, Schauer continues, it becomes obvious that what we accept as "the Constitution" need not be perfectly coextensive with the words inscribed in the printed Constitution. Then comes his conclusion:

The process of constitutional amendment, therefore, can take place on one of two levels. On the constitutional level, it can take place within the contours of the constitution itself. . . . But because constitutions owe their "constitutionality" to logically and politically antecedent conditions, the process of constitutional amendment may also take place at another level, when these logically and politically antecedent conditions are themselves amended.<sup>92</sup>

Schauer's effort to focus attention on the context of constitutionalism—the context in which constitutional amendment and constitutional interpretation are possible, and in which debates about amendment and interpretation are meaningful—marks an important advance. Debates about the possibility of constitutional "amendment," as opposed to revolution or replacement, make sense only within a functioning legal system. Moreover, the "practices" of recognition that are the logical antecedents of legal validity within our legal system are complex and diverse.<sup>93</sup> We recognize or accept the written document called "the Constitution" as law, but we also appear to accept as authoritative—as definitive of the Constitution's meaning—any sociologically plausible decision rendered by the Supreme Court. In other words, it is part of our practice to accept as constitutionally valid (or invalid) nearly anything that the Supreme Court, at least

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89 See *id.* at 149–52. By his own account, Schauer draws primarily on HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 115–36 (Anders Wedberg trans., 1961), and HART, *supra* note 45, at 97–114, 245–47.

90 See Schauer, *Amending the Presuppositions*, *supra* note 4, at 152–53.

91 See *id.* at 153–57.

92 *Id.* at 160–61.

93 See Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621 (1987).

when acting within sociologically established bounds of plausibility, says is valid (or invalid).

Because the general public seems so accepting of the interpretive authority asserted by the Supreme Court, and so disposed to equate "the meaning" of the Constitution with the Supreme Court's interpretations of it, the most crucial question for many practical purposes involves the practices of recognition of the Justices of the Supreme Court. Suppose, then, that the question is whether—to translate Bruce Ackerman's question into the terms that Schauer commends—the presuppositions of American constitutionalism were amended in the 1930s so that, among other things, certain restrictions on governmental regulation under "constitutional" provisions such as the Due Process and Contracts Clauses would no longer be recognized as part of the Constitution binding as law.

If we were to seek an answer to this question in the practices of the Justices of the Supreme Court, I think it would quickly become apparent that the question could not be answered in the form in which it was put. In one sense, the Court continues to "accept" the same Constitution (in relevant respects) that existed before 1937. Aside from subsequently ratified "formal" amendments, the words in what is universally taken to be the canonical inscription of the Constitution remain the same; any competent legal opinion must state or presuppose a theory that reconciles the conclusion that is reached with the words of the text. In another sense, however, the purposes and demands of the Due Process and Contracts Clauses, for example, are typically described differently than they were before. Different, mid-level principles or tests are viewed as capturing these provisions' meanings. In addition, precedent has accreted, and many cases will be resolved on the basis of precedent, with direct argument over first principles—over the question whether the precedents have understood the Constitution correctly—occurring only rarely.<sup>94</sup>

To my mind, however, the crucial point would be that we make something like a category mistake if we press the question whether a change in the way that the Supreme Court *interprets* the Constitution *amends* the Constitution. Schauer equates the presuppositions of constitutionalism with social fact. But Supreme Court interpretive practice cannot be put into any simple category of social fact; interpretive

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94 See David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

norms themselves call for justification,<sup>95</sup> and what will count as an adequate justification depends (in the first instance at least) on shared understandings that help to constitute the relatively familiar framework of constitutional discourse.<sup>96</sup> By contrast, constitutional "amendment," as that term is most naturally and usefully understood, needs to be justified within a different political practice and a correspondingly different framework of discourse.<sup>97</sup> Amendment, unlike interpretation, may need no substantive justification whatsoever as a matter of law; formal satisfaction of constitutionally prescribed procedural requirements may suffice.

The same point can be put in a different way. Within the practice of American constitutionalism, it is presupposed that the criteria for constitutional identity or sameness generally are satisfied in the absence of a written alteration of the written text. We have the "same" Constitution that we had in 1936, explicit amendments aside, despite enormous changes in our understanding of what the Constitution

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95 Cf. Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 TEX. L. REV. 839, 860-69 (1996) (arguing that the "presuppositions" of constitutional argument require justification).

96 For a sophisticated account of the nature and processes of justification in law, see DENNIS PATTERSON, *LAW AND TRUTH* (1996).

97 But see Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT*, *supra* note 4, at 13 (arguing that constitutional "amendments" can and should be differentiated from constitutional "interpretations" by reference to whether they can be "derived" from the previously existing constitutional text in light of accepted interpretive conventions and by the degree of substantive change that they introduce into constitutional law). I agree with Professor Levinson that some developments in constitutional doctrine are sufficiently discontinuous with previous understandings that they ideally should be effected through constitutional amendment, if at all. Nor am I unsympathetic, in principle, to his effort to develop a vocabulary to distinguish such changes from the kind of elaboration or adjustment associated with "ordinary" constitutional interpretation. I fear, however, that only confusion will follow from using the term "amendment" to embrace doctrinal discontinuities arising solely from judicial decisionmaking, as well as discontinuities arising from a formal alteration of the constitutional text pursuant to Article V. Among other things, alterations arising from Article V procedures possess both a democratic legitimacy and a textually based claim to immunity from judicial reconsideration that comparably revolutionary judicial decisions do not.

This objection would apply with somewhat less force against a theory, such as Bruce Ackerman's, that sharply distinguished between "formal amendments" and "informal amendments" and that established criteria for participation by "We the People," not merely courts, in the process necessary for "informal amendments"—as opposed to judge-driven doctrinal revolutions—to occur. See ACKERMAN, *WE THE PEOPLE*, *supra* note 83; Ackerman, *Storrs Lectures*, *supra* note 83.

means<sup>98</sup>—just as, for example, Bill Clinton holds “the same” office that George Washington held, even though there have been enormous changes in the scope of presidential duties and powers.

Schauer is right, of course, that changes in what he calls the presuppositions of constitutionalism—which is to say, changes in the complex network of practices through which the Constitution is recognized as law, interpreted, and enforced—will inevitably, and not necessarily illegitimately, produce changes in prevailing understandings of what the Constitution forbids or requires. This an important point for anyone who wants to understand American constitutionalism,<sup>99</sup> and it should not be overlooked by those interested in processes of constitutional amendment. Nonetheless, a changed understanding of the written Constitution is not itself an “amendment” of the Constitution; changed understandings are subject to a kind of legitimacy challenge that constitutional amendments are not.<sup>100</sup> If we want a better understanding of the relationship between changed understandings and constitutional amendments, we will do well to begin by keeping them conceptually distinct, if only to make possible both contrast and comparison.

#### IV. DICHOTOMOUS THEORIZING

The problem with a sharply dichotomous theory of constitutional amendments parallels that with presumptive positivism: within our

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98 See, e.g., Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 33 (1995).

99 For example, as the extensive literature on constitutional “originalism” makes clear, our constitutional law has departed from “original understandings” in many crucial areas. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 19–128 (1990); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 727–39 (1988). Moreover, as Schauer’s analytical apparatus usefully helps to demonstrate, there is nothing necessarily “illegitimate” about this development. Legal “legitimacy” must ultimately be measured at least partly by reference to norms that, as a matter of social fact, are accepted as legally controlling. Indeed, I think the argument can be pressed further: The relevant norms within our society could, and I would argue do, both validate (some) non-originalist interpretation as legally “legitimate” and, what is more, sometimes call for reference to explicitly moral considerations in resolving interpretive questions, including interpretive questions about how contested interpretive norms are appropriately specified. If so, it is a contingent fact about the American legal system that the question what the governing interpretive norms actually are is partly a question of political morality. It is also a contingent fact that debates about what the governing interpretive norms ought to be is at least partly internal to constitutional law.

100 See Lessig, *supra* note 95, at 860–69 (arguing that the significance of alterations in the presuppositions of constitutional practice is largely a normative, not a positive question).

legal system, there is no sharp divide between applying or specifying the content of legal norms, on the one hand, and abandoning or altering them in service of extra-legal norms on the other. To this claim, Schauer might object that his aim is to enhance understanding precisely by drawing analytical distinctions that cut against the grain of what is usually thought. But this response, I think, would be a mistake. In my view, the great strength of Schauer's jurisprudential work is as what Hart called "descriptive sociology."<sup>101</sup> His interest is in how rules work, in life and the legal system, not just in adjudication.<sup>102</sup> Analyzed from this perspective, the legal system in general is a device for the allocation of power within a society, and adjudication by highest courts is just one aspect of this device. As a matter of descriptive sociology, courts—dangerous though they may be—remain "the least dangerous branch"<sup>103</sup> within the American legal system. A good descriptive sociology must, I think, explain in fuller detail how the congeries of forces underlying what Hart called "rules of recognition" help to maintain this dynamic equilibrium as a matter of law.

#### V. PRESUPPOSITIONS, MEANING, AND PRESUMPTIVE POSITIVISM

Although I have criticized *Amending the Presuppositions of a Constitution*, it should be clear that I agree totally with what I take to be its main point: what the law is ultimately depends on practices of acceptance not all of which, as a logical matter, can themselves be justified as a matter of law. I am uncertain, however, how the implications of this position relate to some of the claims about the nature of legal rules advanced in *Playing by the Rules*. In *Playing by the Rules*, Schauer asserts that the meaning of legal rules is given by relatively acontextual rules of semantics.<sup>104</sup> To know the meaning of a legal rule—or whether, for example, it applies to particular facts—our principal touchstone must be whether the words in which the rule is expressed would be understood as subsuming those facts by a competent speaker of English with little or no awareness of the specific context in which the rule was propounded or its application was being considered.

In *Amending the Presuppositions of a Constitution*, by contrast, Schauer is at least saying that the asserted status of a norm as a legal norm cannot be determined "acontextually" in any plausible sense of

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101 HART, *supra* note 45, at v-vi.

102 Cf. Schauer, *Rules*, *supra* note 3, at 671 (rejecting accounts of judicial decision-making that are "argumentatively impeccable" on the ground that they are "phenomenologically false").

103 See THE FEDERALIST NO. 78 (Alexander Hamilton).

104 See SCHAUER, *PLAYING BY THE RULES*, *supra* note 2, at 53-62, 207-18.



that term, but instead requires examination of social facts. And if this is so, it would seem to follow that the *meaning* of a legal norm must also depend on matters of social fact—on what the rule, or rules of a similar kind, are accepted as meaning within the legal practice of a particular society. The alternative view, that rules must either be accepted as bearing their “acontextual” meaning or not be accepted at all, would be a claim about the “necessary” nature of law that seems implausible on its face.

If, however, the meaning of legal norms depends on the rules, conventions, or understandings of a society’s legal practice, it becomes plausible to think that legal “meaning” is not as relatively acontextual as Schauer suggests in *Playing by the Rules*.<sup>105</sup> More pointedly, it becomes plausible to think that a legal rule saying “no driving over 55 miles per hour,” when properly interpreted, simply does not apply to a vehicle rushing a heart attack victim to the hospital. On this view, the appropriate characterization is not, as Schauer’s theory of presumptive positivism would suggest, that the rule must yield to supervening social norms of very great weight. The point, rather, would be that the meaning of the rule, *in law*, depends on actual and ascribed purposes in light of common understandings, assumptions about the bounds of reasonableness, and the surrounding body of law.

In offering this suggestion, which seems to me to be invited (though not entailed) by *Amending the Presuppositions of a Constitution*, I do not mean to deny Schauer’s point that the jurisdictional rules of our legal practice may sometimes authorize judges to go beyond what could fairly be characterized as “interpretation” and to displace or modify legal rules in the service of other norms. I merely mean to suggest that “legal meaning” may diverge in important ways from relatively acontextual linguistic meaning and that the bounds of “legal interpretation” may therefore be somewhat broader than Schauer suggests.

Again, Schauer might object that his account has clarificatory power that my suggested alternative does not. Again, however, my guess would be that the “phenomenology” is on my side, not his—that judges, lawyers, and other participants in the legal system much more commonly experience themselves as struggling to support an “interpretation” that they find acceptable than as struggling over the ques-

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105 Cf. Schauer, *Amending the Presuppositions*, *supra* note 4, at 160 (“A society could, for example, shift from a literal to a nonliteral understanding of its [constitutional] amendment provisions, and given the prevalence of nonformal and nonliteral modes of legal and constitutional interpretation in the United States, this may in fact be what has happened.”).

tion whether a rule should be displaced or amended to avoid socially unacceptable consequences. Such an understanding, in turn, may again be relevant to the psychological and sociological forces that maintain the judiciary as "the least dangerous branch."

## VI. CONCLUSION

Unsystematic ruminations could scarcely do justice to Fred Schauer's rich body of work, and I do not pretend to have done so. I would conclude by calling attention to a matter of intellectual style that may help to explain some of the disagreements that I have expressed.

Throughout his legal, philosophical, and jurisprudential writings, Schauer characteristically propounds bold theses. Once the tangle of familiar arguments and confusions is sorted through, he presents sharp, provocative claims about how things either are or ought to be. Schauer's sharply etched conclusions reflect a distinctive intellectual approach, which I assume reflects a belief that bold, memorable generalizations are likely to be more helpful in organizing thought than more complex and qualified claims that are difficult to remember, apply, or test. My own intellectual style tends in the opposite direction—as the ruminations offered in this essay may abundantly illustrate. It may be a small indication of the power of Schauer's work that it consistently challenges and engages even someone with so different a cast of mind.

In any event, as I suggested at the outset, many of my quarrels with Schauer's views about particular issues have resulted from my grappling with his equally provocative and important positions on other topics. His contributions to legal scholarship are many and various, and no one who cares about legal theory can afford to take his work other than seriously.